United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-2109

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs-Appellees,

-against-

RUSSELL OSWALD, Commissioner of Correctional Services, J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants-Appellants.

Docket No. 76-2109

- -X

APPELLEES' PETITION FOR REHEARING EN BANC

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APPELLEES' PETITION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, plaintiffs-appellees Gilliard, Bloeth and Suggs hereby petition this Court for rehearing and reconsideration of its decision entered March 16, 1977, reversing an order of the District Court for the Northern District of New York. Plaintiffs respectfully suggest that this matter be reheard en banc inasmuch as the original decision rendered by the majority of a panel of this Court (Moore and Timbers, JJ., Oakes, J. dissenting), was premised upon errors of law and fact which place it in direct conflict with the law of this Circuit. Moreover, the majority of the panel has erroneously engaged in appellate fact-finding, specifically proscribed by Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiffs, inmates at the Clinton Correctional Facility, Dannemora, New York, brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, seeking damages for their confinement in prison segregation units without due process safeguards. The United States District Court for the Northern District of New York (Port, J.) held, after a trial to the court, that defendants violated the Constitution as well as their own regulations by confining plaintiffs to special housing units where they endured substantial deprivations, without affording them minimal procedural due process. (The decision of the District Court is attached hereto as Exhibit A). The Court determined that no emergency situation existed to justify plaintiffs' confinement without due process and awarded damages to plaintiffs Gilliard, Bloeth and Suggs in the amounts of $715, $748.25 and $740, respectively.

This Court reversed the District Court's decision and order and dismissed the complaint. In its decision (the Slip opinion is attached hereto as Exhibit B), the panel majority disagreed with the District Court's finding that no emergency existed which justified plaintiffs' summary confinement; moreover, in concluding that there was no due process violation, it purportedly distinguished this Court's en banc decision in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert denied, 404 U.S. 1049 (1972), as being limited to "situations involving

specific harsh treatment accorded to a particular inmate." Slip op. at 2340.

Judge Oakes dissented in an opinion which clearly demonstrates that the majority opinion is based on false premises and is inconsistent with the law as established in Sostre and other decisions of this Court.

GROUNDS FOR REHEARING

Petitioners respectfully urge that this appeal be reheard en banc for the following reasons:

1. The majority of the panel has taken a position squarely in conflict with this Court's en banc decision in Sostre, as well as other cases in this Circuit delineating the due process rights of prisoners.

2. In violation of Rule 52(a) F.R.Civ.P., without holding that Judge Port's findings of fact were "clearly erroneous," the majority of the panel substituted its own factual findings. Not only was this impermissible, but the majority's determination is without justification in the record.

I. The Due Process Law of This Circuit

In Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), cert denied, 404 U.S. 1049 (1972), this Court, sitting en banc, held:

> If substantial deprivations are to be visited upon a prisoner, it is wise that such actions should at least be premised on facts rationally determined. This is not a concept without

> meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions.

In rejecting Judge Port's legal conclusion that "[t]he disciplinary action taken against the plaintiffs was in violation of [their] rights to due process of law," Dist. Ct. Op. at 7, the panel majority implicitly overrules and rejects Sostre,* this Court's decision in United States ex rel. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972), aff'g 338 F.Supp. 311 (W.D.N.Y. 1971), and other cases in this Circuit,** as well as defendants' own regulations for the conduct of correctional institutions. Slip op. at 2344, 2350-54.

The majority does not dispute the District Court's conclusion that "plaintiffs' confinement in special housing units . . . constituted substantial deprivations," Dist. Ct. Op. at 6; nor does it contend that plaintiffs were afforded the due process safeguards required by Sostre. Rather, the panel majority casually disposes of Sostre and its progeny as

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* The Sostre due process requirements have been superseded by the more stringent requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). Sostre standards are applicable in the instant case because the conduct at issue occurred prior to Wolff. However, since the issue in this case is whether a hearing was required, and not the incidents of the hearing, the difference in standards is irrelevant, and the decision of the panel majority will constitute a continuing source of confusion.

** See, e.g., United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Bloeth v. Montanye, 514 F.2d 1192 (2d Cir. 1975); Wright v. McMann, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972).

having relevance only in "situations involving specific harsh treatment accorded to a particular inmate." Slip. op. at 2340 As Judge Oakes aptly noted, "To be sure, Sostre did involve a 'particular inmate', just as this case involves three particular inmates." Slip op. at 2352.

This Court has squarely held that Sostre is applicable in a situation involving numerous prisoners and the investigation of prison disturbances. In United States ex rel. Walker v. Mancusi, supra, a large number of prisoners suspected of active participation in the Attica uprising were confined to special housing units under conditions similar to those suffered by plaintiffs in the instant case. This Court affirmed the district court's holding that "due process requires that the inmates be afforded the minimum safeguards set forth in Sostre . . ." and that "suspected participation in a prison disturbance does not justify depriving them of their right to due process." Walker, supra, 338 F.Supp. at 315. Accordingly, there the segregated inmates were given adjustment committee proceedings, informed of evidence against them, and given an opportunity to respond; and where no final disposition was made, substantial evidence of good cause was required for continued segregated confinement. Id. In the present case, none of these fundamental elements of due process were provided.

Significantly, in Walker, a leading application of Sostre, the district court, affirmed by this Court, held that under

departmental regulations, 7 N.Y.C.R.R. §§251.6(d), 304.1 to 304.4, due process safeguards could be suspended only during the initial crisis of a declared emergency and not on an indefinite basis. 338 F.Supp. at 315, 318. These are the same regulations found by Judge Port to have been violated in the instant case. Numerous other courts have similarly held, on constitutional grounds, that while prison authorities may temporarily suspend due process safeguards in a crisis situation, inmates confined to segregation must be afforded due process at the earliest possible opportunity, see, e.g., Morris v. Travisano, 509 F.2d 1358, 1360 (1st Cir. 1975); LaBatt v. Twomey, 513 F.2d 641, 646-47 (7th Cir. 1975), citing Sostre; Braxton v. Carlson, 483 F.2d 933 (3rd Cir. 1973), citing Sostre; and, moreover, courts must exercise an independent judicial judgment as to when that point has been reached. See also, Hoitt v. Vitek, 497 F.2d 598, 600 (1st Cir. 1974); United States ex rel. Robinson v. Mancusi, 340 F.Supp. 662 (W.D.N.Y. 1972); Carter v. McGinnis, 320 F.Supp. 1092, 1096-97 (W.D.N.Y. 1970).

Relying upon this Court's definitive pronouncements in Sostre and Walker, and consistent with the above-cited cases, Judge Port found that defendants' own "procedures were not employed; nor were any other minimal due process procedures," Dist. Ct. Op. at 8, although circumstances would have allowed and even demanded them. In reversing the District Court opinion,

the panel in this case has now placed in question the settled doctrine of Sostre and its progeny.

In Sostre, this Court expressly recognized that the case raised "important questions concerning the federal constitutional rights of state prisoners", 442 F.2d at 181, and further observed that its en banc consideration was intended to "give plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems. . . ." Id. En banc consideration should be granted in this case to maintain the uniformity necessary on this important question of law.

II. Appellate Fact-Finding

The panel majority, having failed to hold any of the District Court's findings "clearly erroneous,"* substituted its own fact-finding in violation of a cardinal rule of appellate review. See Rule 52(a), F.R.Civ.P.; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-496 (1950); Coalition for Education in District One v. Board of Elections of City of New York, 495 F.2d 1090, 1093 (2d Cir. 1974).

* Their indication that they "disagree[d]", Slip op. at 2340, obviously falls short of the standard necessary to set aside a district court's findings.

Judge Port found that "no continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March, 1973 which justified plaintiffs' summary confinement in special housing units,"* Dist. Ct. Op. at 5. Ironically, the majority, in reaching a contrary conclusion, purports to premise its reversal of the District Court on deference to the judgment of corrections officials. It is in fact the statements and sworn testimony of those officials that compel the District Court's finding.

In his announcement to the inmate population, on February 20th, Superintendent LaVallee stated that things were "returning to normal" and that within a few days most shops, work areas and the yard would be open and operating normally. Defendants' Exhibit H. In a letter of February 22, 1973, to Commissioner Oswald, Superintendent LaVallee indicated that programs were resumed on February 19th and that normal activity would resume on the 22nd of February. Defendants' Exhibit I. Most significantly, in a deposition in another action,**in evidence below, Superintendent LaVallee testified that he neither

* As a result of a number of assaults on February 15, 1973, in which plaintiffs "were not involved," Dist. Ct. Op. at 3, the prison was closed down. The District Court did not challenge defendants' discretion in dealing with perceived emergencies when they, in fact, exist. It deferred to Superintendent LaVallee's judgment in responding to the assault incidents of February 15, 1973, and did not make any findings of constitutional deprivation during the subsequent eight day period.

** Ray v. Rockefeller, No. 71-CV-488 (N.D.N.Y.).

declared an emergency nor informed the Department of Corrections of an emergency over the past year. Plaintiffs' Exhibit 3, PA 221-222.* On the same date, Deputy Superintendent Gard testified that on Thursday, February 20th, "[w]e reopened . . . following the shutdown. . . . Since that time we have not had a state of emergency."**

There was further uncontested evidence in the record indicating that by February 19th, the institutional search and shutdown had ended and normal activity, including recreation, mess hall and jobs, had resumed. (PA 13,49,71,144-45). Nevertheless, on or about February 23, after the institution had returned to normal, plaintiffs were removed to segregation units where, for the next five weeks, they were subject to increased punishment and substantial deprivations without being afforded any of the procedural safeguards required by Sostre.

It is indisputable that the record, including defendants' own testimony, fully supported Judge Port's finding that there was no prison emergency during that five week period. The majority's contrary conclusion is simply an alternative construction of the events, prohibited on appellate review and, in any event, without support in the record.

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* "PA" denotes the appendix filed in this Court with plaintiffs-appellees' original brief, which contains the trial transcript.

** Since defendants did not testify at trial, they apparently chose not to retract, or otherwise modify, these statements.

The panel majority also emphasized the appropriateness of an investigation to assure the safety of the inmate population, Slip op. at 2342 - a point which is irrelevant since plaintiffs did not challenge the propriety of the investigation.* Plaintiffs were aggrieved not by the investigation itself but by the denial of minimal due process.

The law is clear that the pendency of an investigation does not obviate the need for due process where prisoners are confined to segregation. See Walker, supra, 338 F.Supp. at 315; U.S. ex rel. Robinson v. Mancusi, supra, at 663-64; Smoake v. Fritz, 320 F.Supp. 609, 612 (S.D.N.Y. 1970); Carter v. McGinnis, supra, at 1096-97; 7 N.Y.C.R.R. §252.3(d-f). The notion that providing notice and a hearing to plaintiffs would have endangered anyone's safety--the apparent unstated premise of the majority's opinion--has no imaginable basis in reality.** Similarly, the majority's bald assertion that providing a hearing for each of the segregated inmates "would have been virtually impossible," Slip op. at 2343, is sheer speculation never proven or even asserted by defendants at trial.***

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* In any case, the importance of this "subtle investigation" seems very doubtful given the fact that the plaintiffs were never questioned about their involvement or lack of it in the prison disturbances, and, moreover, that they were transferred to another facility before the investigation had been completed. (PA 136, 176).

** In fact, due process protection was afforded to those prisoners who, unlike plaintiffs, were accused of actual misconduct.

*** Indeed, the majority's suggestion that "a few hundred" inmates were potentially involved, Slip Op. at 2343, is simply erroneous. See Defendants' Exhibits I and K.

While purporting to defer to corrections officials who were "on the scene," the panel majority has ignored those officials' own sworn statements and has posited a set of facts contradicted by the record. Their findings may not properly be substituted for those of the District Court.

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court should reconsider its decision of March 16, 1977, and the appeal should be set for rehearing en banc.

Respectfully submitted,

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Dated: New York, New York
March 30, 1977

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

THEODORE H. KATZ, being duly sworn, deposes and says that on March 30, 1977, I served a copy of the foregoing Petition For Rehearing by mailing in the United States mail, postage prepaid, a true and correct copy of same to the attorney for Defendants-Appellants, Joan P. Scannell, Assistant Attorney General, State of New York, Department of Law, 2 World Trade Center, New York, New York 10047.

Theodore H. Katz

THEODORE H. KATZ
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Sworn to before me this
30th day of March, 1977.

Nancy Lee
Notary Public

Nancy Lee
Qualified in NY Co.
#45/9262
Comm'n Expires 3/30/78

EXHIBITS TO APPELLEES' PETITION FOR REHEARING EN BANC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs

-against-

73-CV-249

RUSSELL G. OSWALD, Commissioner of Correctional Services and J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants.

APPEARANCES:

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EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

In this case tried to the court, the plaintiffs, inmates of Clinton Correctional Facility, seek damages for their alleged unconstitutional confinement in special housing units and segregation. The damages alleged in this action, instituted on behalf of the plaintiffs by the Legal Aid Society Prisoners' Rights Project, in contrast to the usual complaint having astronomical ad damnum clauses; see, e.g., Ray v. Rockefeller, 352 F.Supp. 750 (N.D.N.Y. 1973), are

refreshingly realistic. The complaint seeks $850.00 compensatory damages for plaintiffs Bloeth and Suggs and $825.00 for plaintiff Gilliard. Punitive damages in the sum of $340.00 for Bloeth and Suggs and $330.00 for Gilliard are also demanded, in addition to small sums for specified lost wages.

Upon consideration of the evidence and exhibits and the memoranda and arguments of the parties, I conclude that the plaintiffs are entitled to judgment in their favor and find as follows:

1. Prior to February 15, 1973, plaintiffs Gilliard, Bloeth and Suggs were housed in general population areas at the Clinton Correctional Facility.

2. While confined in general population, plaintiffs were permitted, inter alia, to:

a) participate in various institutional educational, vocational, recreational, exercise and religious services and programs;

b) live in cells furnished with sink, bed, toilet, full sized locker, a desk and a chair;

c) possess their personal property;

d) intermingle with other inmates;

e) leave their cells for substantial periods of time each day;

f) eat their meals in the mess hall; and

g) make purchases from the commissary.

3. As a result of a number of assaults upon inmates by other inmates on February 15, 1973, defendant LaVallee ordered that the Clinton Correctional Facility be completely closed down, and that the entire inmate population be locked in their cells. The defendant LaVallee based his authority for such action upon 7 N.Y.C.R.R. § 251.6(f), which reads:

§251.6(f) The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner.

4. 7 N.Y.C.R.R. § 251.6(d) provides:

If the officer having charge of an inmate or if any superior officer has reasonable grounds to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility, such fact shall be reported to the superintendent and the superintendent may order confinement in a special housing unit. Any such order shall be in accordance with Part 304 of Chapter VI of the rules and regulations of the department.

5. Plaintiffs were not involved in the assaults of February 15, 1973.

6. For the following few days the prison population remained in their cells 24 hours a day while the entire facility was thoroughly searched.

7. As a result of the search, a large volume of weapons and other items of contraband were discovered. However, no weapons or items of contraband were discovered on plaintiffs' persons or in their cells and none were otherwise attributed to them.

8. Plaintiffs, on or about February 23, 1973, were transferred[1] to Housing Block E which had been converted into a special housing unit from a general population area.

9. While confined to special housing unit E, plaintiffs were deprived of most of the privileges and amenities they had been afforded

in general population. They were:

a) denied participation in any institutional educational, vocational, recreational or religious services or programs;

b) permitted to possess only limited items of their personal property;

c) confined to their cells 23 hours a day;

d) denied contact with inmates in the general population;

e) permitted only 1 hour a day exercise in a small enclosed yard;

f) permitted only one 15 minute period per week to both shower and wash their clothes;

g) made to eat meals in their cells; and

h) had no opportunity to work or receive wages.

10. At no time were any of the plaintiffs informed of any specific charges against them or why they were the subject of any investigation, and at no time were they given a hearing at which they could challenge their confinement in E-Block. Moreover, plaintiffs were never informed how long they would have to remain in E-Block.

11. On or about March 12, 1973, without explanation, plaintiffs were transferred to Unit 14, the disciplinary housing unit at Clinton Correctional Facility, normally used for the confinement of inmates found guilty of serious violations of institutional rules.

12. While confined to Unit 14, plaintiffs were:

a) denied participation in any program or activity which would allow them to have visual contact with any other inmate;

b) confined to cells furnished with only a metal bed, bedding, and a combination toilet and sink;

c) denied most of their personal property except limited reading and writing material, a shortened toothbrush, toothpaste and clothing;

d) subjected to strip searches and tear gassings;

e) permitted only 1 hour a day exercise in a small yard;

f) had no opportunity to work or receive wages; and

g) denied commissary privileges.

13. At no time were any of the plaintiffs informed of any specific charges against them or why they were the subject of any investigation and at no time were they given a hearing at which they could challenge their confinement in Unit 14. Moreover, plaintiffs were never informed how long they would have to remain in Unit 14.

14. Plaintiffs remained in Unit 14 until they were transferred out of the Clinton Correctional Facility. Plaintiff Gilliard was transferred out on March 27, 1973 and plaintiffs Bloeth and Suggs on March 28, 1973.

15. The only notice received by the plaintiffs in connection with their confinement in E-Block or Unit 14 was a copy of Plaintiffs' Exhibit 1. A copy of Plaintiffs' Exhibit 1, addressed individually to each of the plaintiffs from the defendant LaVallee, advised each plaintiff that he was being placed in temporary keeplock status with others until such time as the defendant LaVallee determines "that a change in your status should be made". The notice further advised that the action was being taken "pursuant to 251.6(f) of the Rules and Regulations of the Department of Correctional Services."

16. At the time of their initial keeplock, plaintiffs Gilliard and Suggs were unemployed,[2] and plaintiff Bloeth was receiving a wage of 25 cents a day as a block porter.

17. No continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March 1973 which justified plaintiffs' summary confinement in special housing units.

18. Defendant Oswald was informed and personally aware of the confinement of plaintiffs under the above-stated conditions.

19. Defendants Oswald and LaVallee personally participated in the treatment accorded the plaintiffs herein.

20. The improper conduct herein was not part of a pattern of such behavior by the defendants or other officials. Further, situations giving rise to the necessity for a wholesale keeplock will only occur, hopefully, very rarely. During such periods of emergency, the action of prison officials should not be unduly restricted. Therefore, the imposition and award of punitive damages herein would not serve a salutory purpose.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties hereto. 28 U.S.C. § 1343, 42 U.S.C. § 1983.

2. Plaintiffs' confinement in special housing units on and after February 23, 1973 constituted substantial deprivations and they were thus constitutionally entitled to minimal procedural due process.

3. No emergency situation existed at Clinton during plaintiffs' confinement in special housing units on and after February 23, 1973 which justified defendants' failure to afford plaintiffs said minimal procedural due process.

4. Even assuming an emergency existed at Clinton, 7 N.Y.C.R.R. § 251.6(f) did not justify plaintiffs' transfer from their cells in general population to special housing or their continued confinement therein without minimal due process of any kind. They were not given the reasons for such confinement; they were not charged with any violations; they were not afforded even the most informal opportunity for

any denial of wrongdoing or to request a return to general population with its attendant benefits.

5. The disciplinary action taken against the plaintiffs was in violation of the plaintiffs' rights to due process of the law.

6. The plaintiffs have sustained the allegations alleged in their complaint by a fair preponderance of the credible evidence.

7. The plaintiffs have established facts entitling each plaintiff to damages.

8. Plaintiffs are entitled to recover compensatory damages to redress their unconstitutional confinement in special housing units on and after February 23, 1973.

9. Plaintiffs are not entitled to recover punitive damages.

10. Judgment should be entered in favor of the plaintiffs and against the defendants as follows: in favor of the plaintiff Gilliard in the sum of $715.00; in favor of the plaintiff Bloeth, $743.25; and in favor of the plaintiff Suggs, $740.00.

DISCUSSION

The defendants rely on plaintiffs' Exhibit 1 as giving notice to the plaintiffs of their transfer to special housing. In so doing, defendants misconstrue the section relied upon. Assuming an emergency situation, § 251.6(f) merely requires that § 251.6, setting forth the conditions relating to confinement, should not be construed so as to prohibit emergency action by the superintendent. Subsection (f) permits confinement to a cell (keeplock) for the duration of any emergency "in which the safety or security of the facility is in jeopardy." Although the notice referred to placing the plaintiffs in temporary keeplock, they were, in fact, confined to a special housing unit. Such

confinement is distinguished from the keeplock permitted during an emergency. The keeplock during an emergency is in the inmate's own cell. The confinement in a special housing unit is triggered by reasonable grounds on the part of the prison official "to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility". § 251.6(d). No facts supportive of such behavior on the part of any of the plaintiffs was shown. In any event, the transfer to special housing from general housing pursuant to § 251.6(d) "shall be in accordance with Part 304 of Chapter VI of the rules and regulations of the department", which "[insure] that [plaintiffs'] due process rights would be protected through utilization of procedures prescribed by written Rules that had been published and put into effect by the Department of Correctional Services." U.S. ex rel Walker v. Mancusi, 467 F.2d 51, 52-53 (2 Cir. 1972).

Such procedures were not employed; nor were any other minimal due process procedures.

Reliance on subdivision (f) is further misplaced under the facts herein because, charitably treating the plaintiffs' confinement during the period subsequent to February 23 as keeplock, it extended beyond the period permitted by that subdivision.

JUDGMENT

For the reasons herein, it is

ORDERED, that judgment be entered in favor of the plaintiffs and against the defendants as follows: in favor of the plaintiff Gilliard

in the sum of $715.00; in favor of the plaintiff Bloeth in the sum of $748.25; and in favor of the plaintiff Suggs in the sum of $740.00.

Edmund Port A

Senior United States District Judge

Dated: July 22, 1976
Auburn, New York

FOOTNOTES

[1] Mr. Suggs, who was already in E-Block at that time, testified that once it was declared a special housing unit, many inmates were transferred out and the conditions became substantially more restrictive. (Tr. 49-50).

[2] Although unemployed, they were receiving unemployed pay of 20 cents a day. Page 4 of letter from Lt. G. Hoy to W. Gard, dated June 8, 1973, contained in defendants' reply dated January 23, 1974 to plaintiffs' request for production of documents.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 532—September Term, 1976.

(Argued January 3, 1977 Decided March 16, 1977.)

Docket No. 76-2109

RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs-Appellees,

—against—

RUSSELL OSWALD, Commissioner of Correctional Services, J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants-Appellants.

Before:

MOORE, OAKES and TIMBERS,

Circuit Judges.

Appeal by defendant officials of the New York State Department of Corrections from a decision of the United States District Court for the Northern District of New York, Honorable Edmund Port, *Judge,* granting plaintiff inmates monetary damages pursuant to 42 U.S.C. §1983, for deprivation of due process.

Judgment reversed.

EXHIBIT B

THEODORE H. KATZ, Esq., New York, N.Y. (William E. Hellerstein, Josel Berger and The Legal Aid Society, Prisoners' Rights Project, of counsel), *for Plaintiffs-Appellees.*

JOAN P. SCANNELL, Deputy Assistant Attorney General, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Defendants-Appellants.*

MOORE, *Circuit Judge:*

Defendants, Russell G. Oswald, Commissioner of Correctional Services and J. Edwin LaVallee, Superintendent of Clinton Correctional Facility (hereinafter "Clinton") appeal from a judgment in favor of plaintiffs, Raymond Gilliard, Francis Bloeth and John Suggs, inmates of Clinton at the time of the events herein described, awarding them $715, $748.25 and $740, respectively, as damages for their alleged "unconstitutional confinement in special housing units on and after February 23, 1973". (App. 9). The case was tried to the Court. Jurisdiction is premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

The theory upon which the District Court based its decision may be summarized in its finding that no emergency situation existed at Clinton on and after February 23, 1973 and that "[p]laintiffs' confinement in special housing units on and after February 23, 1973 constituted substantial deprivations and they were thus constitutionally entitled to minimal procedural due process." Conclusions of Law 2 and 3 (App. 8). Because we find no basis on the law and the facts for the judgment based thereon, we reverse for the reasons hereinafter stated.

The defendant LaVallee was the Superintendent at Clinton. As such, he was responsible for the welfare and safety of some 1600 inmates. Needless to say, this responsibility begat problems. These problems should not be analyzed in a legalistic way more than three years after the events in issue by judges who did not have to cope with the situation presented to the Superintendent at the time. Rather, if justice is to be accomplished, we must try to look through the Superintendent's eyes at what he saw and into his mind as to his reaction thereto.

Prior to February 15, 1973 there had been a series of assaults by inmates upon inmates which apparently culminated on February 15th with the serious injury of five of them, two of whom had to be hospitalized. Faced with this situation, the Superintendent declared a state of emergency, ordering that Clinton "be completely closed down, and that the entire inmate population be locked in their cells." Finding of Fact 3 (App. 4). This he was entitled to do "if necessary for the safety or security of the facility" and to direct that "all inmates or any segment of the inmates . . . be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy."[1] Such procedure is known as "keeplocking".

Thereafter an intensive search was conducted, both of the inmates and of their cells, which search uncovered a large number of weapons and other contraband. Next, it became necessary to determine, if possible, those responsible for the assaults. This investigation was far more difficult and time consuming. The prison was divided into fourteen separate areas from which lists were obtained as to disruptive or potentially disruptive inmates. Appear-

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1 Section 251.6(f) of Title 7 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

ances on one or more of the lists presented good cause for further investigation.

On February 23, 1973, to further the investigation and to allay the fears of other inmates, some 140 men, including the plaintiffs, were transferred to a Special Housing Unit referred to as the "E Block". Notice of the transfer was given to each of the inmates transferred, the substance of which was that he was being placed "in temporary keeplock status" because of the February 15, 1973 disturbance until his status was determined, and that the action was taken "for the safety and security of you, and the institution." (App. 23).

On March 12, 1973, while the investigation was continuing, plaintiffs and others were moved to a more restrictive area, known as "Unit 14", and on or about March 28, 1973, plaintiffs were transferred to the Adirondack Correctional Treatment and Evaluation Center. In early April a report was made that the emergency had ended. On May 22, 1973 plaintiffs commenced this action.

The District Court, in its Memorandum Decision and Order, stressed the facts that plaintiffs were not informed of any specific charges against them and that they were not given a hearing so as to challenge their confinement. With the court's finding that there was no continuing state of emergency from February 23, 1973 to late March, 1973, justifying plaintiffs' summary confinement in special housing units and the court's conclusion that the disciplinary action taken against the plaintiffs was in violation of their due process rights (App. 7, 9), we disagree.

At the outset, in our consideration of the law we must not be guided by the decisions of those courts which faced situations involving specific harsh treatment accorded to a particular inmate. In other words, we are not dealing with a *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), type of case or with facts

as presented in other and different cases. Nor should we be misled by the word "emergency" and endeavor to give it a talismanic meaning. Instead we should look to the actual situation which confronted the man charged with the responsibility of the safety of some 1600 inmates, a man possessed of years of practical experience in prison management, to decide whether his judgment in handling the situation then before him failed to comport with permissible standards.[2]

The Superintendent's actions were not called into play because of, or against, these three plaintiffs. A situation had arisen requiring a thorough investigation of the entire prison and its inmates. The three plaintiffs, even after their names appeared on several lists, were not singled out; they merely became part of some 140 inmates requiring further investigation. Segregation of these 140 might well have assisted and expedited that investigation. Furthermore, only by such a procedure could it be determined whether or not these plaintiffs were involved. Moreover, there has been no showing below of either malice or lack of good faith on the part of the Superintendent.

The District Court found that there was no continuing emergency after February 23, 1973, but the Court was not on the scene or responsible for the welfare of the inmates. An "emergency" of the type exhibited in Clinton in February 1973 cannot be measured with the timing of a stopwatch or have an automatic shut-off switch. It may well

2 "The psychology and social stability of a prison community are foreign to one who is not involved with it on a day-to-day basis. Any attempt to reconstruct, at a later date, the conditions present at the time of dispute, and the dangers then feared by prison authorities, is fraught with perils of misunderstanding and misapprehension.

Accordingly, the standard of review of a challenge to the sufficiency of the basis for emergency response must be generous to the administration." *LaBatt* v. *Twomey*, 513 F.2d 641, 647 (7th Cir. 1975) (an emergency keeplock situation).

be that the immediate measures taken by the Superintendent caused the assaults to cease, but these visible signs would not necessarily evidence a cure of the cause or assure accurate identification of the troublemakers. Their ascertainment would necessitate time and subtle investigation because it is to be doubted that inmates would relish even the suspicion of being known as informants. The methods to be pursued had to be entrusted to the discretion and judgment of the Superintendent. His judgment should prevail absent a clear showing of gross abuse.

Moreover, a prompt return of these inmates to their original cellblocks might have resulted in a renewal of the very evil which the Superintendent was seeking to cure.

> "[T]he possibility of widespread violence is a continuous condition of prison life. A good faith determination that immediate action is necessary to forestall a riot outweighs the interest in accurate determination of individual culpability before taking precautionary steps. Indeed, even in many of the minor decisions that guards must make as problems suddenly confront them in their daily routines, the state's interest in maintaining disciplined order outweighs the individual's interest in perfect justice." *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701, 717 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

A hypothetical, but not fanciful, case might well have arisen had the Superintendent prematurely ended his investigation and an inmate been seriously injured as a result: The injured inmate could well have argued liability for failure to do the very acts which the Superintendent carried out here.[3]

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3 *See, e.g., Fox* v. *Sullivan*, 539 F.2d 1065 (5th Cir. 1976); *Curtis* v. *Everette*, 489 F.2d 516 (3rd Cir. 1973), *cert. denied*, 416 U.S. 995

Plaintiffs argue lack of a hearing. This argument overlooks the fact that at this stage the Superintendent's acts were entirely administrative and the proceedings purely investigatory. Even reducing the number of inmates potentially involved to a few hundred, a hearing for each would have been virtually impossible. And a hearing for what? The situation was not ripe for definite charges—and charges should not be made until facts justifying them are obtained.

The law in this Circuit is clear that under circumstances far less compelling than those now before us that

> "Prison authorities must of necessity be allowed wide discretion in the use of protective confinement for the purpose of protecting the safety and security of the prison and its general population [citing cases]." *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51, 53 (2d Cir. 1972).

In view of our conclusion that the record discloses no violation of plaintiffs' constitutional rights it is unnecessary for us to pass upon the question of personal liability on the part of defendants Oswald or LaVallee or of Oswald's knowledge of the Clinton incident or any liability therefor.

Judgment reversed; complaint dismissed; no costs.

OAKES, *Circuit Judge* (dissenting):

Appellate fact-finding is one thing. It violates Fed. R. Civ. P. 52(a), which provides that facts found by the trial court "shall not be set aside unless clearly erroneous,"

(1974); *Parker* v. *McKeithen*, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). *See also*, *Mitchell* v. *Boslow*, 357 F. Supp. 199 (D. Md. 1973); *Matthews* v. *Henderson*, 354 F. Supp. 22 (M.D. La. 1973).

but no constitutional or statutory requirements, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Overruling our own circuit's decisions relative to the requirements of the due process clause of the Fourteenth Amendment is quite another; here constitutional as well as institutional considerations are involved. Because the majority opinion engages in appellate fact-finding and by implication overrules *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972), while incidentally disregarding New York State's own regulations for the conduct of correctional institutions. I dissent.

Facts

The facts actually found by Judge Port must be restated in order to put the case in its proper light. Prior to February 15, 1973, appellees were housed in "general population areas" at the Clinton Correctional Facility in Dannemora, New York, living under the usual prison conditions, which included certain programs and minimal amenities. *Gilliard* v. *Oswald*, No. 73-CV-249, slip op. at 2 (N.D.N.Y. July 22, 1976) [hereinafter cited as Dist. Ct. Op.].[1] As a result of a number of assaults on February 15, in which

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1 While confined in general population, plaintiffs were permitted, inter alia, to:

a) participate in various institutional educational, vocational, recreational, exercise and religious services and programs;

b) live in cells furnished with sink, bed, toilet, full sized locker, a desk and a chair;

c) possess their personal property;

d) intermingle with other inmates;

e) leave their cells for substantial periods of time each day;

f) eat their meals in the mess hall; and

g) make purchases from the commissary.

Gilliard v. *Oswald*, No. 73-CV-249, slip op. at 2 (N.D.N.Y. July 22, 1976) [hereinafter cited as Dist. Ct. Op.].

appellees "were not involved," *id.* at 3, Superintendent LaVallee ordered the facility to be "completely closed down" and the entire population confined to their cells, *id.* at 2, *i.e.*, "keeplocked," as permitted "if necessary for the safety or security of the facility" by 7 New York Codes, Rules & Regulations [hereinafter cited as N.Y.C.R.R.] § 251.6(f).[2] During the ensuing several days, the entire facility was "thoroughly searched," and a large volume of weapons and other contraband was discovered, although none was found on appellees' persons or in their cells or "otherwise attributed to them." Dist. Ct. Op. at 3.

On February 23, 1973, appellees were transferred, without explanation, to special housing unit E, or "E-Block,"[3] where they were "deprived of most of the privileges and amenities they had been afforded in [the] general population." *Id.* at 3–4.[4] At no time were any of them "informed

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2 7 New York Codes, Rules & Regulations [hereinafter cited as N.Y.C.R.R.] § 251.6(f) provides:

> The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner.

3 Appellee Suggs was already in E-Block at the time. He testified that, after E-Block was declared a special housing unit, "many inmates were transferred out and the conditions became substantially more restrictive." Dist. Ct. Op. at 10 n.1.

4 The appellees were:

> a) denied participation in any institutional educational, vocational, recreational or religious services or programs;
>
> b) permitted to possess only limited items of their personal property;
>
> c) confined to their cells 23 hours a day;
>
> d) denied contact with inmates in the general population;
>
> e) permitted only 1 hour a day exercise in a small enclosed yard;

of any specific charges against them or why they were the subject of any investigation, and at no time were they given a hearing at which they could challenge their confinement in E-Block." *Id.* at 4.[5] This confinement, the district court found, *id.* at 8, violated the Correctional Services Department's own rules for "Admission to Special Housing Units," 7 N.Y.C.R.R. §§ 304.1 to 304.4, which are designed in part to ensure due process protection, *see United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51, 52-53 & n.2 (2d Cir. 1972), and thus also violated the rule relating to transfer of prisoners from general to special housing, 7 N.Y.C.R.R. § 251.6(d).[6]

On March 12, 1973, again without explanation, hearing, or compliance with other departmental procedures, appellees were transferred to Unit 14, "the disciplinary housing unit at Clinton Correctional Facility, normally used for the confinement of inmates found guilty of serious violations of institutional rules." Dist. Ct. Op. at 4.[7] In Unit 14 appellees were:

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f) permitted only one 15 minute period per week to both shower and wash their clothes;

g) made to eat meals in their cells; and

h) [denied any] opportunity to work or receive wages.

Id. at 3-4.

5 They were also "never informed how long they would have to remain in E-Block." *Id.* at 4.

6 7 N.Y.C.R.R. § 251.6(d) provides:

> If the officer having charge of an inmate or if any superior officer has reasonable grounds to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility, such fact shall be reported to the superintendent and the superintendent may order confinement in a special housing unit. Any such order shall be in accordance with Part 304 of Chapter VI [7 N.Y.C.R.R. §§ 304.1 to 304.4] of the rules and regulations of the department.

7 Martin Sostre was confined there for 17 months for failure to shave his ¼" beard. *See Sostre* v. *Preiser*, 519 F.2d 763 (2d Cir. 1975).

a) denied participation in any program or activity which would allow them to have visual contact with any other inmate;

b) confined to cells furnished with only a metal bed, bedding, and a combination toilet and sink;

c) denied most of their personal property except limited reading and writing material, a shortened toothbrush, toothpaste and clothing;

d) subjected to strip searches and tear gassings;

e) permitted only 1 hour a day exercise in a small yard;

f) had no opportunity to work or receive wages; and

g) denied commissary privileges.

Id. at 4-5. In Unit 14, as in E-Block, *see* text at note 5 *supra*, appellees were not informed of any charges or of the reason for the investigation and were not accorded any hearing. *Id.* at 5.[8] Appellees were transferred out of Clinton on March 27 and 28. *Id.*

Specifically finding that "[n]o continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March 1973 which justified [appellees'] summary confinement in special housing units," and that both appellants Oswald and LaVallee "personally participated in the treatment accorded" appellees, *id.* at 5-6,[9] Judge Port awarded compensatory damages in al-

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8 Appellees were again, *see* note 5 *supra*, not informed how long they would remain in special housing. Dist. Ct. Op. at 5.

9 The court also found that appellant Oswald was "informed and personally aware of the confinement of [appellees] under the above-stated conditions." *Id.* at 6.

most the full amount of the appellees' ad damnum clauses, which the judge called "refreshingly realistic," *id.* at 2.[10]

Appellate Fact-Finding

The majority quite candidly concedes that it is fact-finding, stating: "With the court's finding that there was no continuing state of emergency from February 23, 1973 to late March, 1973, justifying plaintiffs' summary confinement in special housing . . . we disagree." The majority does not state that the finding was "clearly erroneous," as is required to set aside trial court findings of fact under Fed. R. Civ. P. 52(a), but merely that it "disagrees." As the Supreme Court has reminded us: "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. . . . The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did . . . ." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). *See also United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495 (1950) ("It is not enough [under Rule 52(a)] that we might give the facts another construction, resolve the ambiguities differently . . .").

Far from being "clearly erroneous," the judge's finding was entirely proper. By February 19 the search of the facility was substantially complete, and, as was established by the testimony of Deputy Superintendent Gard and others, most inmates, including appellees, were released and permitted to go to the mess hall, the recreation area, and job facilities. On February 20 Superintendent LaVallee announced to the inmate population:

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10 Appellee Gilliard was awarded $715.00; Bloeth $748.25; and Suggs $740.00. *Id.* at 7. The amounts of the awards are not challenged by appellants.

> [W]e are returning to normal as rapidly as possible.
>
> . . .
>
> On Wednesday, the 21 [*sic*], we will be as near normal as possible in terms of the search. Most shops and work areas will be open. The yard will operate normally . . . .

Defendants' Exhibit H.

On February 22, 1973, appellant LaVallee wrote appellant Oswald: "Starting on Monday [February 19], programs were gradually resumed and it is anticipated that with some exceptions, normal activity will resume on Thursday." Defendants' Exhibit I. In a deposition in another action[11] in evidence below, LaVallee testified on March 22, 1973—five weeks after the prison population was keeplocked and while appellees were still in Unit 14—that he had not "declared a state of emergency at this institution at any point during the past year" or informed the Department of Corrections "that there was an emergency . . . over the past year." Plaintiff's Exhibit 3. On the same date in that other action, Deputy Superintendent Gard testified more accurately perhaps, that, while there had been an emergency in connection with the February shutdown, "[w]e reopened the facility Thursday following the shutdown . . . . Since that time we have not had a state of emergency."

With the correctional authorities themselves conceding under oath that there was no emergency existing, it is difficult to understand the majority's disagreement with Judge Port's finding that there was no emergency after February 23, 1973. The majority's disagreement is par-

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11 *Ray* v. *Rockefeller*, No. 71-CV-488 (N.D.N.Y.). An opinion giving some of the facts of this case and denying a preliminary injunction and class action certification can be found in 352 F. Supp. 750 (N.D.N.Y. 1973).

ticularly perplexing because it purports to be deferring to the judgments of the men charged with running the prison, yet fails even to mention their own statements that there was no emergency. When to these concessions is added the evidence that the search of the inmates and their cells had been completed, the shutdown had ended, and normal prison life had been resumed, all of which Deputy Superintendent Gard conceded, it is beyond cavil that the record supports Judge Port's finding.

The Due Process Law of This Circuit

The majority also disagrees with Judge Port's legal conclusion that "[t]he disciplinary action taken against the [appellees] was in violation of [their] rights to due process of the law." Dist. Ct. Op. at 7.[12] In so doing, the majority relies upon *United States ex rel. Walker* v. *Mancusi, supra*; distinguishes *Sostre* v. *McGinnis, supra*; and fails to consider the other cases in this circuit bearing on the due process question. In each respect it seems to me that the majority decision is unsound.

Walker upheld the segregation in a special housing unit at Attica Correctional Facility of inmates who "were active participants in the bloody riots of September 9-13, 1971." 467 F.2d at 53. The segregation there involved "keeplocking," but the segregated inmates had access to showers, newspapers, magazines, and radio, had commissary and package privileges, and received wages. The court ruled that such segregation did not violate the Eighth Amendment (cruel and unusual punishment) or the equal

12 It is not clear why the judge used the term "disciplinary action," since he not only found no misconduct on appellees' part but also found that "[t]hey were not given the reasons for [their] confinement; they were not charged with any violations . . . ." Dist. Ct. Op. at 6. Perhaps he was using "disciplinary" in the broad sense of institutional action, without reference to punishment for a specific breach of prison rules.

protection or due process clause of the Fourteenth Amendment. With regard to the due process claim, Judge Mansfield for the court was careful to point out that, exactly contrary to the situation in the instant case, the Attica superintendent and his staff initiated adjustment committee proceedings for each of the segregated inmates in accordance with departmental rules; they also "reviewed each case, informed each inmate of the evidence against him, and gave him the opportunity to consent to continued restrictive confinement or to reply to the evidence against him." *Id.* There, too, "[s]ubstantial evidence of good cause for continued segregated confinement was found . . .," and a copy of the findings was furnished to each inmate, who was entitled to review by the Commissioner of Corrections. *Id.*

In *Walker*, in short, despite the fact that the inmates had evidently participated in riots, they were accorded due process protections. Here, by contrast, appellees received no similar protections, even though they had *not* participated in the assaults or been charged with any other violation. *Walker*, to be sure, does contain some broad language about the "wide discretion" of prison authorities in safety and security matters, *id.*, from which the majority opinion here draws a semblance of solace and with which I do not disagree. But *Walker*'s holding was that "the procedures followed by the Attica authorities . . . while not as precise or detailed as might be required under other conditions, were sufficient to satisfy minimum requirements of 'fair play.' See *Sostre* v. *McGinnis*, 442 F.2d at 196." 467 F.2d at 53-54. Judge Port below found that here the department's own procedures "were not employed; nor were any other minimal due process procedures." Dist. Ct. Op. at 8. The majority opinion does not purport to state facts to the contrary. *Walker* is entirely inapposite.

The majority disposes of our en banc decision in *Sostre*[13] in two short sentences, distinguishing it and its progeny as decisions in which courts "faced situations involving specific harsh treatment accorded to a particular inmate." To be sure, *Sostre* did involve a "particular inmate," just as this case involves three particular inmates. True, *Sostre* also involved certain specific harsh treatment accorded that inmate ("punitive segregation"), just as this case involves specific harsh treatment, which was the substantial equivalent of that meted out in *Sostre*. *Compare* Dist. Ct. Op. at 3-5, *quoted in* note 4 and text following note 7 *supra, with* 442 F.2d at 185-87.

More important than the parallels between the instant case and *Sostre,* however, is the fact that a decision limited solely to Martin Sostre's situation would hardly have merited the "extraordinary" step of en banc consideration, 442 F.2d at 181, which this court generally reserves for resolution of legal questions of broad significance. Certainly the *Sostre* court did not think its decision was limited in the way the majority today suggests. The en banc court there spoke of problems of this nature as "persistently seeking solution in the courts" and of the case as raising "important questions concerning the federal constitutional rights of state prisoners . . . " *Id.* at 181.

Sostre held that, "[i]f substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined." *Id.*

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13 At the time of the incidents here involved, *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), had not yet been decided. Because *Wolff* is expressly not retroactive, *id.* at 574, *Sostre* is controlling here. *See Bloeth* v. *Montanye,* 514 F.2d 1192, 1194 & n.3 (2d Cir. 1975); *United States ex rel. Larkins* v. *Oswald,* 510 F.2d 583, 587 (2d Cir. 1975); *Williams* v. *Vincent,* 508 F.2d 541, 545 (2d Cir. 1974). Of course, I would not reach a different result if *Wolff* were applicable, since that case goes even further than *Sostre* in requiring that substantial deprivations of liberty in a prison context be accompanied by due process. *See Williams* v. *Vincent, supra.*

at 198. For an inquiry to meet minimum requirements of fairness and rationality, the court ruled, a prisoner must be "confronted with the accusation, informed of the evidence against him, . . . and afforded a reasonable opportunity to explain his actions." *Id.* In the instant case, it is undisputed both that appellees were subjected to substantial deprivations in E-Block and Unit 14, including, in the latter case, strip searches, tear gassings, and denial of personal property, work and commissary privileges, and eye contact with other inmates, *see* note 4 and text following note 7 *supra*, and that they did not receive even the rudiments of due process.

The post-*Sostre* cases in this circuit certainly have not viewed the *en banc* decision as limited to a one-prisoner situation. *Wolfer*, as noted above, cited *Sostre* in holding that the Attica inmates there involved *were* afforded minimal due process. 487 F.2d at 54. In *Wright* v. *McMann*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972), which involved two Clinton inmates when appellant LaVallee's immediate predecessor was warden, the court quoted at length from *Sostre* and summarized as follows: "In short, because we are loathe to graft onto state prison disciplinary hearings a broad panoply of procedural requirements does not mean that rudimentary due process can be ignored at the caprice of prison officials." *Id.* at 130. Other cases in this circuit have also viewed *Sostre's* due process holding as having general applicability beyond the facts of that case. *See, e.g., Bloeth* v. *Montanye*, 514 F.2d 1192, 1194-95 (2d Cir. 1975); *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583, 587 (2d Cir. 1975). *See also Cunningham* v. *Ward*, No. 76-2068, slip op. 731, 735 (2d Cir. Dec. 1, 1976) (per curiam) (reversing summary dismissal of due process claim of keeplocking without procedural protection); *Powell* v. *Ward*, 542 F.2d 101 (2d Cir.

1976) (requiring hearings within seven days of confinement in "special housing" or segregation, except in emergencies). Numerous decisions of other circuits have taken a similar view of *Sostre's* broad significance. *See, e.g., Carlo* v. *Gunter,* 520 F.2d 1293, 1296 n.4 (1st Cir. 1975); *Clutchette* v. *Procunier,* 497 F.2d 809, 818 (9th Cir. 1974), *rev'd on other grounds sub nom. Baxter* v. *Palmigiano,* 425 U.S. 308 (1976); *Meyers* v. *Alldredge,* 492 F.2d 296, 304 & n.23 (3d Cir. 1974) (terming *Sostre* "the leading case"); *Adams* v. *Carlson,* 488 F.2d 619, 625 (7th Cir. 1973); *Palmigiano* v. *Baxter,* 487 F.2d 1280, 1284 (1st Cir. 1973), *rev'd on other grounds,* 425 U.S. 308 (1976); *Braxton* v. *Carlson,* 483 F.2d 933, 940 (3d Cir. 1973); *Adams* v. *Pate,* 445 F.2d 105, 108 (7th Cir. 1971); *Morrissey* v. *Brewer,* 443 F.2d 942, 961 (8th Cir. 1971), *rev'd on other grounds,* 408 U.S. 471 (1972).

Personal Responsibility of Appellants

The majority did not need to reach, as I do, the question whether appellants should be held personally liable. It has been clear since *Ex Parte Young,* 209 U.S. 123 (1908), of course, that a state official who violates a person's federal constitutional rights may be held personally liable for the damages caused thereby. *See Scheuver* v. *Rhodes,* 416 U.S. 232, 237-38 (1974). To be held liable, however, the official must have had knowledge of the acts constituting the violation, *Johnson* v. *Glick,* 481 F.2d 1028, 1034 (2d Cir. 1973), and must have disregarded "basic, unquestioned constitutional rights," *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975).

Judge Port, as stated, *see* text at & note 9 *supra,* found that appellants had personally participated in and were personally aware of the unconstitutional confinement of appellees and consequent denial of their rights. As to

Superintendent LaVallee, this finding is not here challenged. As to Commissioner Oswald, he had received a memorandum from LaVallee, dated February 22, 1973, that told him that "47 men remain in KL [keeplock] status with no specific charge," to which was appended a list of names, including appellees', of those "in KL pending investigation and screening process." Defendants' Exhibit I. On March 2, a supplemental list was sent to Deputy Commissioner Quick on which appellees were listed as continuing in keeplock status, Defendants' Exhibit K; this list was described by Deputy Superintendent Gard as being sent to "update" the Commissioner." Gard also testified that "the Commissioner's office" sent a Corrections Department counsel to the prison "to assist the [prison] administration," as is further indicated by Defendants' Exhibit J. Finally, even were these items not in the record, Oswald's knowledge could be deduced from Corrections Department regulations requiring that he be notified "immediately" upon the confinement of inmates to their cells or the designation of special housing units and that he be informed of the conditions therein. 7 N.Y.C.R.R. §§ 251.6 (f), 302.2, 302.3.

Hence there was abundant evidence that Oswald "knew or should have known," *Wright* v. *McMann, supra,* 460 F.2d at 135, of the conditions of appellees' confinement. *See also Malsnak v. Commissioner,* 529 F.2d 272, 275-76 n.5 (2d Cir.), *cert. denied,* 426 U.S. 911 (1976); *United States ex rel. Larkins v. Oswald, supra,* 510 F.2d at 589. At the very least, this evidence established a prima facie case of knowledge, and appellants offered no evidence to the contrary. The person who could best describe what Oswald knew, Commissioner Oswald himself, did not even testify at the trial. Judge Port's finding of Oswald's personal knowledge, then, far from being "clearly erroneous," is strongly supported by the record.

On the issue whether the law in this area was "settled, indisputable," "established," or "unquestioned," as is required under *Wood* v. *Strickland, supra,* 420 U.S. at 321-22, before § 1983 liability for violations of the law can be imposed, it is relevant that *Sostre* v. *McGinnis, supra,* was decided by this court in February, 1971, two years before the events here in question, and that *Wright* v. *McMann, supra,* was decided almost a year before the events. Given these two decisions, no state prison official could reasonably have believed in February, 1973, that substantial deprivations could be visited upon inmates without granting them any form of due process. *See The Supreme Court, 1974 Term,* 89 Harv. L. Rev. 47, 222 (1975) (citing *Wood* v. *Strickland, supra,* 420 U.S. at 322, for proposition that public officials are chargeable with greater awareness of law in their field than would be expected of persons in the street); *cf. Landman* v. *Royster,* 354 F. Supp. 1302, 1318 (E.D. Va. 1973) (Merhige, *J.*) (prison practices "of such a shocking nature that no reasonable man could have believed that they were constitutional"). Far from involving "unforeseeable constitutional developments," *O'Connor* v. *Donaldson,* 422 U.S. 563, 577 (1975), *citing Wood* v. *Strickland, supra,* the law in this area at the relevant time was about as "settled" and "unquestioned" as law can ever be in our system of case-by-case development of the contours of constitutional rights.

Conclusion

The majority opinion reminds us, and I agree, that "we should look to the actual situation which confronted" Superintendent LaVallee. Reference is also made to his "experience," "discretion," and "judgment," with the suggestion that we should be extraordinarily deferential thereto. I will not comment further upon the lack of deference

to the trial judge's findings with which the majority disagrees. But I do not think that in the long run it is useful to correction officers themselves to defer to such an extent as to permit them to violate the minimal constitutional requirements of fair play. Their violation of the law establishes an atmosphere within the prison that makes it more difficult to administer. Judge Coffin of the First Circuit stated my sentiments exactly in *Palmigiano* v. *Baxter, supra,* 487 F.2d at 1283:

> Time has proved . . . that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among the inmates it contains that they are being treated unfairly.

Finally, one must note with some irony the proposition advanced toward the end of the majority opinion: "[A]t this stage the Superintendent's acts were entirely administrative and the proceedings purely investigatory. . . . The situation was not ripe for definite charges—and charges should not be made until facts justifying them are obtained." I applaud the recognition that charges should not be made until justifying facts are obtained. But I ask whether punishment should be visited upon those as to whom no facts are at hand to support suspicions, while those as to whom there is evidence of misconduct receive hearings and clear dispositions of their cases, as is said to have happened here. For Unit 14, where each of appellees

spent over two weeks, was the very place used for punishment at Clinton, according to testimony of Superintendent LaVallee,[14] who also said that persons placed there for their own protection or for transfer are generally treated the same as those for punishment. Plaintiffs' Exhibit 3. Any parallel to Alice's Queen's dictum, "Sentence first—verdict afterwards," is purely coincidental.

I dissent and would affirm Judge Port's modest judgment, well-founded as it was in fact and law.

14 Deposition of March 22, 1973, *Ray* v. *Rockefeller*, No. 71-CV-438 (N.D.N.Y.).